



The social policy clash. EU cross border welfare - and national residence clauses

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The Social Policy Clash

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EU Cross-Border Welfare, Union Citizenship and National Residence Clauses

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Introduction

Although the European Union has not formally been assigned welfare policy competence, it has for decades regulated social benefits between the member states. The social rights and obligations of the European migrant have for long been safeguarded by the EU, and the mutual welfare responsibility undertaken by the member states of the Union constitutes an extraordinary piece of social Europe.

The focus of this paper is the long run welfare integration which has taken place in the European Community and has been expanded in the European Union through the coordination scheme of Community Regulation 1408/71¹. The regulation has recently been substantially reformed with the adoption of Regulation 883/2004², but has furthermore in key parts unfolded through issue linkages to Union citizenship and internal market principles. The paper seeks to demonstrate that a European

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¹ Regulation (EEC) No. 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community.

² Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems. Official Journal L 166, 30/04/2004 P. 0001–0123.

welfare dimension has for long been a material fact, patched up by judicial activism versus political caution, exemptions and compromises.

Constructing an European Welfare Dimension

The coordination scheme is one of the oldest parts of social Europe. As a slender idea, it was inserted in the Paris Treaty, and has then been gradually extending in scope and regulatory force ever since. The general purpose of the Regulation is to promote intra-European migration by ensuring that the one who moves and settles in another member state will not lose or have hers/his social security entitlements put into jeopardy. The Regulation prescribes that the European migrant has *equal* social security rights as the settling state's own nationals, as well as he/she has a right to *export* acquired welfare entitlements, should one live in a different member state than the one of social affiliation. The implementation of these Community prescriptions means that the Regulation prohibits national legislation that discriminates against the migrant from another member state, as well as it partly prohibits the territorialisation of national benefits through residence clauses.

One of the main areas of controversy concerning the scheme that coordinates welfare across borders has been to define the scope and limits of its material content, in particular where to draw the line between social security and social assistance and deciding the criteria for when the Community principle of exportability overrules national residence clauses. In essence, the controversy concerns which, and how, certain social benefits should be coordinated. The question of the material scope and limits of the regulation contains questions about whether free movement should be extended to all groups of people, in particular people who are dependent on care, and unemployed and non-economically active people.

The welfare integration process has been driven through dynamic interpretations by the European Court of Justice. However, the process also provides examples of political backlashes at crucial points, either through collective political decisions or reluctant implementation. The former however indeed remains seldom, whereas reluctant implementation or even pre-emption (Conant 2002) through counteractive national legislation appears to be more frequent political/administrative responses. Nevertheless in a long-run perspective such national responses do not constitute sufficient strongholds, as both the Commission and the ECJ continue to lay down dynamic means

and ends for the Community (Martinsen 2005a). In the long run, the national strongholds do not stand against the governance and enforcement procedures of the supranational actors.

This specific welfare integration process is a long tale of social policy clashes where national boundaries are challenged and compromised by the free movement principles of the European Community. It is a process which redefines the historical elements of citizenship (Wiener 1998) and the traditional features of welfare boundedness (Ferrera 2005). It does so by redefining 1) the scope of social rights; where can welfare entitlements be consumed, and by redefining 2) access and belonging; who has a right to be included in the welfare community?

Structure of the paper

This paper aims to depict the historical and contemporary contents of the ‘social policy clash’ through which welfare norms and boundaries resettle. The paper does so through an empirically detailed analysis of the scope and limits of the EU welfare dimension, by *firstly* defining the conceptual borders between social security and social assistance and setting out the traditional reasoning for demarcating welfare by territorial principles. The paper *then* examines the history of the controversy over ‘special non-contributory benefits’ – a conceptual demonstration of Community compromise in unique, from the early exportability of these benefits, to their later re-territorialisation in annex IIa, and its later legal confirmation by the European Court of Justice (ECJ). The *third* part of the paper looks at developments in the classification of long-term care benefits and the legal challenges to, and reassessment of, the content of annex IIa which present new challenges to the principle of territoriality. The *final two parts* of the paper look at the most recent developments; a) the annulment procedure brought by the European Commission, b) the new set of rights stemming from European citizenship, and c) the defence and justification of national residence clauses against the free movement provisions and Union citizenship. These recent developments suggest that, on the one hand, the principle of exportability is reinforced and social benefits, whatever their nature, become accessible for all in the name of Union citizenship. On the other hand, however, member states have taken counter measures to strengthen national residence clauses. The importance of residence clauses is exemplified, in this paper, by the UK habitual

residence test, but could equally have been illustrated by recent legislative developments in Finland.³

I: Social Security versus Social Assistance

Settling the material scope and limits for coordination of social security within the European Union has been a recurring point of controversy. *Social assistance* is explicitly excluded from the Regulation.⁴ Much of the political, legal and administrative dispute on the material scope of the Regulation has concerned defining the boundaries between *social security* on the one hand and *social assistance* on the other.

When Regulation 1408/71 was adopted, its substantive scope seemed reasonably clear. On the one hand, social security benefits were included, exhaustively listed in the Regulation. The prime characteristics of national '*social security*' schemes again seemed fairly clear. The general characteristic of social security was, and still is, that security from social risks is offered by public schemes through which specific categories of persons are, compulsory or voluntarily, insured against defined social risks. The schemes are generally financed by collectively paid contributions. The beneficiary of social security schemes is entitled to legally defined benefits based upon individual contributions. The level of benefits is also legally defined independently of income (van der Mei 2002, p. 553).

On the other hand, '*social assistance*' benefits are excluded under Article 4 (4) of the Regulation. Social assistance was, and is, different in nature to social security, being provided by the state to its citizens or long-term residents who are unable to provide for themselves, and are without alternative financial means. Social assistance is usually granted on a discretionary basis, within which a means test is likely to play a role. In contrast to social security, social assistance schemes are non-contributory, and financed from tax revenues. However, previous tax payment is not a criterion for

³ The recent Finnish reform of the Act on the Application of Residence-Based Social Security Legislation (635/2004), which partially entered into force August 2004 and totally as from 1 January 2005. The amendment inserts a 4 months clause, requiring EEA employees to have worked 4 months in Finland to be eligible for national health insurance, child care subsidies and family allowances, to earn credits for national pension and to be covered by the unemployment allowance act.

⁴ As laid down by art. 3 (5) of Regulation 883/2004 and article 4 (4) of Regulation 1408/71.

entitlement (van der Mei, *ibid*). Social assistance policies have traditionally been based on the principle of territoriality.

The distinction between the two benefit types has become blurred over the years. As national welfare systems have developed, they have increasingly combined aspects of each. The new mixed nature of some benefits means that today's social security may be granted on the basis of a means test, while at the same time, social assistance has often become a legally enforceable right (Pieters 1997, p. 207). This development has, in turn, impacted upon the Community rules for the coordination of social security.

The territorial principles of welfare

The formation and consolidation of modern social policies took place within the territorial boundaries of the nation-state. Welfare policy was, and remains, closely related to the concept of the nation-state (Eichenhofer 2001, p. 55). The welfare state inherited the nation-state way of defining entitlement with its strong emphasis on territoriality. The welfare state has traditionally been in a sovereign position to require that social benefits and services are distributed and consumed within its territory (Leibfried & Pierson 1995). Alongside that of social citizenship⁵, the principle of territoriality has defined the scope and reach of European welfare.

Social legislation in the EU member states largely remains based on the principle of territoriality. (Haverkate & Huster 1999, p. 115). Even, in a 'globalised' world, the principle finds political justification. Social benefits and services are designed to address domestic policy aims and correspond to domestic living conditions and costs (Tegtmeier 1990, p. 29; Clever 1992, p. 300). Above all, the principle of territoriality provides an effective means of national control:

- It ensures budgetary control, by restricting benefits and services to people who reside and/or are present within the national borders.

⁵ Social citizens were traditionally those who were members of the nation. Concepts such as equality and solidarity were not unlimited, but restricted to members of the nation. T. H. Marshall's depiction of 'social citizenship' stands to date as the perhaps most referred one. He wrote: "Citizenship is a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed" (Marshall 1992, p. 18).

- It ensures that the policy objective is pursued in practice by, for example, monitoring that long-term care benefits are in fact used to purchase care and that family benefits meet policy intentions.
- It serves as a means of controlling the quality of services through nationally defined standards.
- It facilitates capacity planning, ruling out the need to take account of foreign provision.

While member states, through Regulation 1408/71, applied the principle of exportability to *social security benefits*, at least in respect of cash benefits, a long-running dispute has taken place between the European Court of Justice (ECJ), individual states and the Council as to a) whether those benefits, characterised as '*special non-contributory benefits*' due to their affinities with both social security and social assistance, are exportable, and b) whether Community law prescribes the exportability of more recently accepted social responsibilities such as those provided for by *long-term care benefits*. Parts two and three below will, in turn, examine the exportability of special non-contributory benefits and long-term care benefits.

II: Special Non-contributory Benefits within National Borders

One of the first cases examining the territorial reach of 'special non-contributory benefits' was that of *Piscitello*, which concerned the Italian 'social aid pension'.⁶ Despite the opinions submitted by member states to the effect that the social aid pension had strong affinities with social assistance, the Court ruled that the benefit was exportable under Community law.

The legal and political contest over the nature of 'special non-contributory' benefits culminated with the assessment of the French supplementary allowance in the joined cases 379 to 381/85 and 93/86 *Giletti et al.* (Eichenhofer 2001, p. 80; Christensen & Malmstedt 2000, p. 82).⁷

The French government argued in its observation that the nature of the benefit was that of social assistance. The supplementary allowance could not be classified as social security, because 1) it was

⁶ Case 139/82, 5. May 1983. *Paola Piscitello v Istituto Nazionale della Previdenza Sociale (INPS)*. ECR 1983, p. 1427.

⁷ Joined Cases 379 to 381/85 and 93/86, 24 February 1987. *Caisse régionale d'assurance maladie Rhone-Alpes v Anna Giletti, Directeur régional des affaires sanitaires et sociales de Lorraine v Domenico Giardini, Caisse régionale d'assurance maladie du Nord-Est v Federico Tampan and Severino Severini v Caisse primaire centrale d'assurance maladie*. ECR 1987, p. 955.

not financed by contributions, but by public funds, 2) it was not related to occupation, but was a matter of national solidarity, and 3) the objective of the national allowance was to alleviate a state of need and, therefore took the personal income of the recipient into consideration.

The ECJ, however, disregarded the national observations. The Court stated that, although the benefit was financed out of tax revenue and aimed to provide a minimum level of income for the recipient, it was an old age benefit within the meaning of 1408/71, since it was granted as a legally protected right. The Court furthermore overruled the French residence clause, holding that, in accordance with Community law, the supplementary allowance was exportable.

However, despite the Court's conclusions, France still refused to comply, and the dispute over the supplementary allowance continued. Against this background, the Commission issued an infringement procedure, case C-236/88 *against France*. The Court again concluded that the French authorities were obliged to export what it considered to be an old age benefit.

The legally imposed exportability of the French supplementary allowance did not, however, continue for long. On the 30 April 1992, the Council of Ministers unanimously adopted Regulation 1247/92⁸, which overruled the Court's extension of exportability. The collective political response had been clear: The interpretations by the Court had gone too far beyond the political intention. The Council managed to overcome the significant threshold of unanimity to rein-in this unintended and unwelcome development in case law.

Regulation 1247/92 amended 1408/71, and added a 'special rule' to the coordination system. The 'special rule' meant that 'special non-contributory benefits' were included in the material scope of Regulation 1408/71, and rights in the course of acquisition could be aggregated, but the benefits remained confined to the territory of the competent state and could not be exported. For a benefit to be coordinated according to the 'special rule', it should be listed in annex IIa of the Regulation. Among other benefit types, annex IIa came to list the French supplementary allowance from the National Solidarity Fund⁹; the Italian social pensions for persons without means¹⁰; and the UK

⁸ Council Regulation (EEC) No 1247/92 of 30 April 1992 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community.

⁹ Law of 30 June 1956.

attendance allowance¹¹, disability living allowance¹² and family credit. The member states thus retained control over the territorial reach of these benefits.

The amendment ‘corrected’ the expansionary course taken by the Court, and adopted a mechanism within the system allowing for ‘special non-contributory benefits’ to be re-territorialized. In the subsequent case of C-20/96 *Snares*¹³, the Court was requested to interpret the compatibility of the special rule and Article 51 of primary law. The case questioned whether the territorial limits of the UK disability living allowance was setting aside the essence and purpose of Article 51 - to promote the free movement of migrant workers. The Court, however, chose to accept the political position of its previous rulings, codified by 1247/92, and found that UK legislation did not violate Community law, since “the principle of the exportability of social security benefits applies so long as derogating provisions have not been adopted by the Community legislature” (para. 41 of the judgement). Case C-297/97 *Partridge*¹⁴ followed on the *Snares* case, questioning the nature of another UK disability allowance - attendance allowance - a benefit awarded to care-dependent persons. The preliminary reference concerned whether the answer given by the Court in the case of *Snares* also applied to a benefit such as attendance allowance, while substantively the case treated the circumstances of Mrs *Partridge*, whose attendance allowance had been withdrawn when she went to live with her son in France. The judgement of the Court reaffirmed the position taken in *Snares*. Attendance allowance was a special non-contributory benefit, exclusively governed by the rules laid down in Article 10a, and was therefore not exportable outside the territory of the UK.

With the adoption of 1247/92 and its legal affirmation in the cases of *Snares* and *Partridge*, ‘special non-contributory’ benefits appeared to have been definitively re-territorialized. Between them the Commission, Court and Council institutionalised the position that the regulatory text can permit new departures from the general - but not absolute - principle of exportability. However, more recent case-law has refocused attention on ‘the special rule’ – and in particular on the its

¹⁰ Law no 153 of 30 April 1969.

¹¹ Both as formulated in the Social Security Act 1975, section 37A and 35.

¹² Disability Living Allowance and Disability Working Allowance Act 1991.

¹³ Case C-20/96, 4 November 1997. *Kelvin Albert Snares v Adjudication Officer*. ECR 1997, p. I-6057.

¹⁴ Case C-297/96, 11 June 1998. *Vera A. Partridge v Adjudication Officer*. ECR 1998, p. I-3467.

administration – as will be discussed below with reference to the cases of *Jauch*, *Leclere* and *Hosse*. In these more recent cases, the Court has been less willing to appease ‘national interests’.

III: Exportability of ‘New’ Social Responsibilities: Long-Term Care Benefits

Long-term care benefit is a type of benefit that could not easily have been anticipated when the material scope of 1408/71 was first set out. Indeed, ‘long-term care’ has taken some time to find its place in the lexicon. Although ‘reliance on care’ has always existed as a social phenomenon, long-term care did not figure as an independent or conceptualised social security risk in European or international conventions during the 1970s (Igl 1998; opinion of advocate general Cosmas in Case C-160/96 *Molenaar*). Although by no means a ‘new’ social risk, it is a risk which, in some member states, has only recently been accepted as part of public welfare, and not the sole responsibility of the family.

Germany introduced the ‘Pflegeversicherungsgesetz’ in 1995, recognising long-term care as an independent social risk. Before the adoption of the care insurance law, long-term care was either provided publicly as a social assistance benefit, or bought privately (Igl & Stadelmann 1998, p. 37). Today any person insured against sickness in Germany is also compulsory insured under the long-term care scheme. The scheme is funded by contributions from both workers and employers, and entitles a member to be cared for, either in a nursing home, or in their own home. Where the preference is for home care, it is possible to choose either care as a benefit in kind, or as a monthly allowance, i.e. ‘Pflegegeld’ where the recipient then purchases the care themselves.

A monthly cash allowance is the preferred form of home care. From the outset, 80 per cent of those in home care chose the cash benefit (Igl 1998, p. 23). However, according to national legislation, entitlement to the German ‘Pflegegeld’ was suspended if a recipient took up residence abroad.¹⁵ The ‘Pflegegeld’ thus relied on the territorial principle.

¹⁵ The residence clause is laid down by § 34 (1) (1) of the German Sozialgesetzbuch (Social Security Code) XI.

Whether the territorial demarcation of the German ‘Pflegegeld’ contradicted Community law was examined in case C-160/96 *Molenaar*.¹⁶ The case discussed the right to ‘Pflegegeld’ of Mr. and Mrs. *Molenaar*, a Dutch - German couple, working in Germany but living in France. They were both voluntarily insured against sickness in Germany and were, from January 1995, required to pay care insurance contributions, which they did. However, when they applied, they were informed by the German social security fund that they were not entitled to care insurance benefits due to their French residence.

The ECJ commenced its reasoning by referring to previous case-law, stating that a benefit was to be regarded as a ‘social security benefit’ if granted “on the basis of a legally defined position and provided that it concerns one of the risks expressly listed in Article 4 (1)” of 1408/71 (para. 20 of the judgement).¹⁷ It added that the list of Article 4 (1) was exhaustive; thus a branch of social security not mentioned was not part of the regulatory scope.¹⁸ Long-term care, such as the German ‘Pflegeversicherung’, was, therefore, to be regarded as a sickness benefit within the meaning of Article 4 (1) (a) of Regulation 1408/71. Having thus included the care allowance within the material scope of 1408/71, the Court continued by examining whether the residence clause in German law could be justified against the Community principle of exportability.

While Article 19 (1) (a) & (b)¹⁹ of Regulation 1408/71 obliges the competent institution to export cash sickness benefits, it does not apply to sickness benefit in kind (Huster 1999, p. 12). Although a monthly cash allowance, ‘Pflegegeld’ was defined as a benefit in kind under German law. More specifically, the draft of the ‘Pflegeversicherungsgesetz’ defined the care allowance as a ‘benefit in kind-substitute’, a ‘Sachleistungssurrogat’ (BT-Drucks 12/5262, p. 82; Zuleeg 1998, p. 172). The ECJ did not accept this national classification, but ruled that the German care allowance was indeed

¹⁶ Case C-160/96, 5. March 1998. *Manfred Molenaar and Barbara Fath-Molenaar v Allgemeine Ortskrankenkasse Baden-Württemberg*. ECR 1998, p. I-880.

¹⁷ The Court referred on this point to case 249/83 *Hoeckx*, paras. 12-14; case 122/84 *Scrivner* paras. 19-21; case C-356/89 *Newton* and case C-78/91 *Hughes* para. 15.

¹⁸ In this point, the ECJ here referred to case C-25/95 *Otte*.

¹⁹ Article 19 (1) of 1408/71 stated: “Residence in a Member State other than the competent State – General rules [...]: (a) *benefits in kind* provided on behalf of the competent institution by the institution of the place of residence in accordance with the provisions of the legislation administered by that institution as though he was insured with it (b) *cash benefits* provided by the competent institution in accordance with the legislation which it administers [...]” (emphasis added).

a cash benefit (para. 36 of the judgement). Consequently, the Court concluded that the residence clause in German law conflicted with the principle of exportability contained in Regulation 1408/71.²⁰

Territorialisation re-questioned

Recent developments further demonstrate that the limits and the scope of Community law are being continually clarified through dynamic processes. The cases of *Jauch*²¹ and *Leclere*²² seriously challenged the balance established by annex IIa which had, with the category of ‘special non-contributory benefits’, reconciled competing political and legal interests and perspectives.

In the cases of *Jauch* and *Leclere*, the Court was again asked to clarify the scope of annex IIa. The case of *Jauch* concerned a German national, residing in Germany, but who had worked in Austria where he was affiliated to the social security scheme. The competent Austrian institution had denied him long-term care, since he was not a habitual resident in Austria, and as the care allowance was listed in annex IIa of 1408/71, it was non-exportable. The Austrian government argued before the Court that because the benefit had been accepted for inclusion in annex IIa, the residence clause did not conflict with Community law. The government supported its view with reference to the earlier cases of *Snares* and *Partridge*. The Court’s reasoning, however, followed that laid down by the *Molenaar* judgement:

“...while care allowance may possibly have a different legal regime at the national level, it nevertheless remains of the same kind as the German care insurance benefits at issue in *Molenaar*, and is likewise granted objectively on the basis of a legally defined situation” (para. 26 of the judgement).

The Court thus ruled that the character of the Austrian care allowance was no different from the German ‘Pflegegeld’. The Austrian care allowance was to be classified as a cash sickness benefit, and exportable and in the Court’s view had been wrongly included in annex IIa. In the case of *Jauch*, the Court put aside, not only the Austrian government’s definition of its benefit, but also

²⁰ As laid down by Article 19 (1) (b) of 1408/71.

²¹ Case C-215/99, 8 March 2001. *Frederich Jauch v Pensionsversicherungsanstalt der Arbeiter*. ECR 2001, p. I-1901.

²² Case C-43/99, 31 May 2001. *Ghislain Leclere and Alina Deaconescu v Caisse nationale des prestations familiales*. ECR 2001, p. I-4265.

overruled the praxis of the Council, which had unanimously agreed to list the care allowance in annex IIa.

In addition, the *Leclere* case set out the scope of annex IIa. The case interpreted the rights of Mrs. *Leclere*, whose husband had formerly worked in Luxembourg, while the couple lived in Belgium. The husband suffered an accident at work in 1981, and thereafter received an invalidity pension paid by the Luxembourg social security services. With the birth of their child, they applied for various allowances in Luxembourg, including maternity allowance. Their application for maternity allowance was, however, turned down, since the couple did not fulfil the residence requirement for the benefit, which was one of the benefits explicitly listed in annex IIa of Regulation 1408/71. Again the Court ruled that the maternity allowance had been incorrectly placed in the annex and, contrary to the opinion of the Luxembourg government, had to be exported according to Article 19 (1) (b) of Regulation 1408/71.

IV: Challenges to residence-based welfare states

With these recent developments the Court has re-entered the stage as the central actor to define the scope and limits of cross-border special non-contributory benefits. Perhaps not unexpectedly, several countries have not welcomed the new expansion of exportable rights. In particular, the residence-based welfare states have responded to these developments by introducing new residence criteria, as will be discussed below.

The Council of Ministers agreed to give the principle of exportability a more prominent position in Regulation 883/2004 as article 7.²³ While the new Regulation does not rule out linking special non-contributory benefits to the place of residence, it is clear that national justifications for maintaining residence rules for these benefits will be under closer scrutiny in the future. Furthermore, as part of the ‘simplification’ of Regulation 1408/71, the Commission aims to reduce the annex listing individual special non-contributory benefits. The application of the special rule to national benefits is thus becoming increasingly difficult as shown by recent references to the ECJ.

²³ That is against the former article 10.

The action taken by the Commission against Sweden, Finland and the United Kingdom is one such example. On the 26 of July 2005, the Commission brought an *annulment procedure* against the European Parliament and the Council of Ministers. According to the Commission, several benefits were wrongly listed in annex IIa when the Council and the Parliament adopted the yearly amendment of Regulation 1408/71 through Regulation 647/2005.²⁴ The Commission found that many benefits included in annex IIa do not fulfil the criteria for special non-contributory benefits within the meaning of article 4 (2a) of Regulation 1408/71. The benefits in question are the Swedish disability allowance and care allowance for disabled children, the Finnish child care allowance for disabled children, and the UK disability living allowance, attendance allowance and carer's allowance.

The case brought by the Commission reprises the controversy over the distinction between social security and special non-contributory benefits, setting a Community-based rationale on exportability against national justifications for residence clauses.

According to the *Swedish* authorities the disability allowance and care allowance for disabled children are both special and non-contributory, and thus satisfy the conditions for special benefits contained in article 4 (2a) of Regulation 1408/71. Both benefits are granted on the basis of a discretionary assessment of each individual case and both are tax funded. In contrast, the Commission argues that the disability allowance is a 'sickness benefits in cash' within the meaning of article 4 (1) (a) and that the care allowance for disabled children is a family benefit within the meaning of the Regulation.

The *Finnish* government argues that the child care allowance has been correctly classified as a special non-contributory benefit, as it is means tested and granted on the basis of an assessment of the individual circumstances of the child (Sakslin 2005), thus discretion is decisive for eligibility. The Commission has, however, not found these arguments convincing, but stated in its reasoned opinion that it regarded the child care allowance as a family benefit within the meaning of the Regulation. The Commission's view is thus that confining payment of the benefit to Finnish territory is contrary to Community principles.

²⁴ The Regulation was adopted on 13 April 2005.

With regard to the *United Kingdom*, the dispute returns to the issues considered in the *Snares* and *Partridge* cases. The Commission argues that the UK benefits: disability living allowance, attendance allowance and carer's allowance, have been wrongly included as special non-contributory benefits in annex IIa. From the Commission's point of view these benefits are cash sickness benefits within the meaning of the Regulation to be treated in the same way as the long-term care benefits considered in the *Molenaar* and *Jauch* cases. If the Court supports the Commission's view, it would represent a significant break with its previous line of reasoning. As described above, in the cases of *Snares* and *Partridge*, the Court had accepted that the UK disability living allowance and attendance allowance were not exportable under the special rule. The cases of *Molenaar* and *Jauch* may, however, turn out to be watersheds.

The view of the British government has not changed - that sickness benefits, and in this regard long term care benefits, are different from UK disability allowances. When Germany introduced the long-term care schemes in the mid-1990s, the UK had also considered a similar approach to providing financial support to people with long-term care needs (interview, UK Department of Work and Pension, March 2006). However, instead of introducing a new benefit to address a 'new' social risk, the UK decided to improve the design of, and invest more money, in its existing schemes, in particular to adapt to disability allowances to better meet care needs. Although eligibility for disability living allowance and attendance allowance is decided through a care test, and the carer's allowance can only be awarded to a person taking care of someone who receives disability living allowance or attendance allowance, and even though all three are benefits in cash, the UK government nevertheless insists that these benefits are qualitatively different from social security benefits with the meaning of the Regulation. The decisive point will be how the Court interprets the benefits – whether in line with the Commission's view that similarities between different countries' benefits are the key or if it takes into account the specific objectives and criteria attached to individual benefits claimed by the national governments.

The *Hosse* case from February 2006 may point to the Court's future decisions.²⁵ The case is another legal step to enable care-dependent people to exercise their right to free movement. The *Hosse* case concerns the exportability of the Austrian care allowance to the disabled daughter of a Community worker, employed and insured in Austria but residing in Germany. The case may be a significant

²⁵ Case C-286/03, 21. February 2006. *Hosse v Land Salzburg*.

reference point when the Court decides on the annulment procedure against Sweden, Finland and the United Kingdom since the Austrian care allowance has obvious similarities with the Swedish, Finnish and UK allowances at issue. The Austrian case concerns the legislation for disabled persons and persons in need of care, which has been listed in annex IIa. In the case, the Court lays down that although the Council of Ministers is entitled to adopt provisions that derogate from the principle of exportability²⁶, such derogations have to be treated strictly (para. 25 of the judgement). Furthermore, the Court appears to come close to a conceptualisation of a care-related sickness benefit within the meaning of regulation 1408/71 article 4 (1) (a):

“...benefits which are granted objectively on the basis of a legally defined position and are intended to improve the state of health and life of persons reliant on care have the essential purpose of supplementing sickness insurance benefits, and must be regarded as ‘sickness benefits’ within the meaning of Article 4 (1) (a) of Regulation No 1408/71” (para. 38 of the judgement. The Court substantiates on this point by referring to the cases of *Molenaar* and *Jauch*).

The Court thus applies the same understanding of ‘care allowance’ as in *Molenaar* and *Jauch* although the benefit under consideration is governed by the Austrian law on social assistance (see paras. 11 & 12 of the judgement). The Court, however, finds that although the Austrian care allowance may take a different approach to providing for care to the benefit at issue in *Molenaar* and the Austrian federal care allowance in *Jauch*, it “none-the-less remains of the same kind as those benefits” (para. 42, *Hosse*). Consequently, the Court concludes that the care allowance examined does not constitute a special non-contributory benefit, but instead an exportable sickness benefit. It furthermore restates its conclusion from *Cabanis-Issarte*²⁷, that the daughter of Mr. *Hosse* is entitled to the benefit, although the entitlement is the personal right of Silvia *Hosse* and not one derived from her father.

The competing understandings of special non-contributory benefits, and consequently the appropriate criteria for distinguishing between social security and social assistance will continue to be contested. Apart from the annulment procedure brought by the Commission, other references are being brought before the Court that will confirm or extend the established line of reasoning.²⁸

²⁶ The Court here refers to the *Snares* case.

²⁷ Case C-308/93 *Cabanis-Issarte* [1996] ECR I-2097.

²⁸ Pending case for a preliminary ruling, C-287/05 *Hendrix*, submitted 15 July 2005 & pending case for a preliminary ruling, C-154/05 *Kerzbergen-Lap*, submitted 4. April 2005.

V: EU citizenship rights versus national residence clauses

The judicially-driven extension of care-dependent people's ability to exercise free movement challenges the justifiability of listing national benefits in annex IIa. In some aspects, historical parallels can be found between the move towards reducing the number of benefits accepted as special non-contributory and the process of integration which took place during the 1970s and 1980s when the Court classified an increasing number of national benefits as social security rather than social assistance. As the legal interpretation expressed during the 1970s and 80s narrowed the concept of social assistance, it now does so with regard to special non-contributory benefits.

The development of European citizenship is the other angle from which social assistance and special non-contributory benefits are becoming increasingly accessible EU-wide. The development of rights based in the concept of European citizenship gives rise to several important questions, which include whether these rights outweigh the work-related rights of Regulation 1408/71; whether the citizenship-based rights found in primary law will decide the future scope of welfare rights in the EU, and in turn determine the limits set within the secondary legislation of 1408/71; whether it is now becoming necessary to update secondary legislation to reflect the dynamism of European citizenship rights; and finally, what are implications of these developments for national residence clauses?

The power of European citizenship rights becomes apparent in the cases concerning students as well as those concerning the rights of jobseekers. The Court's conclusions in the *Grzelczyk* case, which addressed the Belgium minimex, extended access to social assistance on the basis of European citizenship.²⁹ Article 12 and 17 of the Treaty rule out discrimination between EU citizens regarding the Belgian social assistance benefit which had previously only been accessible on the grounds of Regulation 1612/68.

"Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for" (para 31 of the judgement. Emphasis added).

²⁹ Case C-189/99, *Grzelczyk*, 20. September 2001.

The same conclusions are drawn in the case of *Trojani*.³⁰ In the *Trojani* case, the Court left open for the national court to decide whether Mr *Trojani* qualified as a worker within the meaning of Treaty article 39. However, regarding his right to the Belgium minimex this was largely irrelevant, since the Court restated that the social assistance benefit was accessible on the basis of European citizenship. European citizenship as the driver of welfare rights can be summarised in three points from the Court's conclusion in the *Trojani* case (paras 42-46):

- 1) a *social assistance* benefit such as the minimex *falls within the scope* of the Treaty;
- 2) a citizen of the Union who is not economically active may rely on Treaty article 12 in the host member state where s/he resides lawfully *for a certain time* or possesses a residence permit; and
- 3) the host member state is free to decide whether recourse to social assistance means that someone no longer fulfils the conditions set out in the residence directives. The member state can then – in accordance with Community law – *repatriate* the EU citizen. However, recourse to social assistance *does not in itself justify repatriation*.

The more recent case of *Bidar* continues to enhance free movement for those without a 'genuine link with the economic market'.³¹ It is an interesting contribution to the growing line of citizenship-based case-law, since the Court here, for the first time, bases welfare rights on the person having established a genuine link with *society* instead of the traditional genuine link with the *economic market* (*Bidar* para 63). *Bidar* is a further case where the limits defined by Regulation 1612/68 are side-lined by rights derived from the concept of Union citizenship. The *Bidar* case concerns whether a student with French nationality, studying and living in the UK, has the right to the UK financial assistance available to students through a subsidised loan. The UK refused Mr. *Bidar*'s application on the grounds that he does not qualify as a worker under Regulation 1612/68 and thus lacks the necessary 'genuine' link to the labour market.

In the case of *Bidar*, the Court explicitly states that the finding in previous cases that assistance to students was outside the scope of the Treaty has now been superseded by the introduction of citizenship of the Union and by the new Title XI, part Three of the Treaty on education and vocational training (para 39 of the judgement). On the basis of evolving Community law, the Court

³⁰ Case C-456/02, *Trojani*, 21. November 2002.

³¹ Case C-209/03, *Bidar*, 15. March 2005.

concludes that financial assistance for students, both in the form of a subsidised loan, as in the case of *Bidar*, or a grant, falls within the scope of the Treaty's article 12 (paras 42 and 48 of the judgement). Having reasoned the extension of the material scope of the Treaty, the Court then takes a further step regarding free movement to conclude that entitlement based upon the status of 'settled person' does not require the student to have established a genuine link with the employment market (para 58) but may require only a 'certain *degree of integration into the society* of that state' (para 57). This might require only that the student has stayed '*a certain length of time*' in the host member state (para 59).

The Court's more recent cluster of case-law cannot, however, be interpreted as a linear expansion of free movement rights. The *Collins* case³² could be regarded as a setback in this regard (Wind, forthcoming). However, on the question of the scope and limits of the welfare rights of people moving within the Community the case leaves room for a more ambiguous interpretation. This case brings the discussion back to special non-contributory benefits, being concerned with the UK income-based jobseeker's allowance, listed in annex IIa of Regulation 1408/71, but this time with reference to European citizenship. The Court clarifies that it *may* be regarded as legitimate for a member state to base entitlement to a benefit, such as income-based jobseeker's allowance, on the condition that the applicant has stayed for a sufficient period in the host member state so as to establish a genuine link with the employment market. On the one hand, this means that a residence requirement is, in principle, a legitimate instrument to ensure such a link. On the other hand, when requiring a period of past residence "the period must not exceed what is necessary in order for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work in the employment market of the host Member State" (para 72 of the judgement).

While these cases point to the impact of the concept of European citizenship, they also pose new questions. While the previous economic basis for relying on the rights of the Treaty is set aside by the concept of Union citizenship, limits are defined instead by concepts of lawful *residence for a certain period* or possessing a residence permit. However, this raises questions concerning how long a person must reside to establish a 'genuine' link with a host member state and thus be entitled to the full range of welfare benefits; when do national residence clauses constitute unjustifiable

³² Case C-138/02, *Collins*, 23 March 2004.

barriers to free movement and Union citizenship-based rights; and what circumstances justify repatriation when recourse to social assistance does not?

The process of defining and clarifying the boundaries of social security continues. Free movement for all has been given further momentum with the new residence directive 2004/38/EC³³ on the basis of which welfare rights are likely to be extended. The Directive eliminates the obligation for EU citizens to obtain a residence permit and introduces a permanent right of residence after five years of continuous residence. Furthermore, it restricts the scope for national authorities to refuse or terminate the residence of EU citizens. Finally, the new residence rights for all EU citizens, including people who are dependent on care, students, and the unemployed, make the social assistance schemes of other member states more accessible. The Directive sets out that entitlement to social assistance in another member state in the future will depend on the residence status of the EU citizens rather than on the more discretionary conditions set out in the previous residence directives and national legislation.

A person who has resided for less than five years in another member state will now enjoy the right of residence as long as s/he does not become an ‘unreasonable burden’ on the host country’s social assistance system and is covered by sickness insurance in the that country. So far the conditions echo the ones found in the three residence directives. However, the administrative discretion to expel an EU citizen due to her or his need of social assistance is clearly limited by the new Directive:

“... an expulsion measure should not be the automatic consequence of the recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion” (Para. 16 of Directive 2004/38/EC. See also Article 14.3 of the Directive).

Proving that an EU citizen is an ‘*unreasonable burden*’ on the social system may be difficult for the member state, when, as has been demonstrated in the cluster of case-law cited above, recourse to social assistance in itself is not sufficient reason.

³³ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Official Journal of the European Union L158 of 30 April 2004).

Justifying national residence tests against free movement provisions and Union citizenship

Regarding the justifiability of national residence tests in the light of enhanced free movement and citizenship rights, the line of case-law suggests that residence clauses are increasingly being challenged by the present status of Community law. This challenge is illustrated by the previously discussed *Collins* case. In terms of national legislation, the case concerns the UK habitual residence test. The habitual residence test was introduced in the UK in 1994 (Roberts 2005). The test applies to some of the benefits listed by the UK in annex IIa, including income-based jobseeker's allowance, income support and the pension credit. EU nationals who are 'workers' under Regulation 1612/68 or covered by Regulation 1251/70 or are 'workers' and covered by Directives 73/148 or 68/360 are exempt from the test. Other EU nationals, however, are not. The habitual residence test was first challenged in the *Swaddling* case and its application found to be incompatible with Community law.³⁴ In the *Swaddling* case, the Court concluded that a person who had exercised their right to free movement, established habitual residence in another member state and then returned to their member state of origin, in this case the UK, could not have their entitlement to income support made dependent on passing the habitual residence test. The habitual residence test was reformed in response to the *Swaddling* case by reducing the period of habitual residence enquiries from five to two years (Roberts 2004).

Despite this move to comply with Community law, the UK habitual residence test continues to be contested. Union citizens and non-governmental organisations have argued that the burden of satisfying the test falls unequally on EU citizens in comparison with UK nationals. National regulations do not define 'habitual residence' and the applicable rules to satisfy the test appear complicated. Among other factors the criteria include where a person normally lives, where s/he expects to live in the future, the length of time spent abroad and the ties with the country of origin.³⁵ The *Collins* case refocuses attention on the habitual residence test. Albeit in a rather ambiguous way, the case casts some doubt on the compatibility between the residence test and community law. On the one hand, the Court states that Union citizenship does not preclude national legislators from

³⁴ Case C-90/97, *Swaddling*, 25 February 1999.

³⁵ For a description of the applicable rules of the habitual residence test, see <http://www.disabilityalliance.org/index.htm>

making entitlement to income-based jobseeker's allowance conditional on satisfying a residence requirement. On the other, the Court emphasises that to be justified in Community law the habitual residence test must be based on objective criteria which are independent of the nationality of the person concerned. That implies that if the residence requirement, in effect, places EU nationals at a disadvantage in comparison with UK nationals, it is not compatible with Union citizens' right to equal treatment. The reflections of the Court place the legal rights of the EU citizen in focus and limit the discretionary space of the national authority:

"However, while a residence requirement is, in principle, appropriate for the purpose of ensuring such a connection, if it is to be proportionate it cannot go beyond what is necessary in order to attain that objective. More specifically, its application by the national authorities must rest on clear criteria known in advance and provision must be made for the possibility of a means of redress of a judicial nature. In any event, if compliance with the requirement demands a period of residence, the period must not exceed what is necessary in order for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work in the employment market of the host Member State" (para 72 of the judgement. Emphases added).

Although the Court does not rule out the test, it makes clear that by not being subject to legislative definition, it does not appear to be based on criteria sufficiently known in advance (Report by the Social Security Advisory Committee 2004, p. 17).

On the basis of the ECJ decision, a further hearing has taken place before the UK social security commissioner. The commissioner found that the habitual residence test was a legitimate means to ensure that the person had been seeking work for a specific period of time. The decision was taken to the UK Court of Appeal. The judgement was issued on 4 April 2006 in which Court of Appeal upheld the commissioner's decision that the habitual residence test is a justified means to clarify whether a genuine link exists with the UK employment market.

However, new questions regarding the habitual residence test have been put forward. In the context of enlargement, the UK habitual residence test has been reinforced³⁶ and claimants must now, besides being habitually resident, also prove that they have 'a right to reside', by satisfying that they have sufficient economic resources not to become a burden on the social security system. According to the UK government, the underlying purpose of the amendment has been to "safeguard the UK's social security system from exploitation by people who wish to come to the UK not to

³⁶ By the Social Security (Habitual Residence) Amendment Regulations 2004, Statutory Instrument 2004. no. 1232.

work but to live off benefits” (Report by the Social Security Advisory Committee 2004, p. 3). This tightening of the habitual residence test has been criticised for going against the parallel development of Union citizenship and thus incompatible with the current state of EC law. It is argued that a new test has added complexity to rules whose application was already unclear, lacks transparency as well as a comprehensive legal definition (Report by the Social Security Advisory Committee 2004). As with ‘habitual resident’, ‘self sufficiency’ is a difficult concept to apply in practice and may be difficult for an individual to prove if transparent and objective criteria are lacking. Nevertheless, with the increasing importance of Union citizenship, concepts such as the ‘right to reside’ and ‘self-sufficiency’ are increasingly defining the scope and limits of EU-wide welfare and those who are able to exercise their right to free movement.

VI: Concluding Remarks

The integration of cross border welfare in the European Union is an empirical confirmation of a community which moves from a market based rationale to one increasingly rooted in a political Union, with citizenship based rights, aiming to promote the mobility of its citizens. It is a process which in concrete demonstrates how the Commission and the European Court of Justice join forces to add substance to the skeleton of European Citizenship. And through the accumulated meanings of detailed and creative interpretations are quite successful in doing so. That is, however, not the same as saying that the supranational reasoning is not met by member state resistance and counteractions. As a process which moves onto the core of the welfare state, it has challenged and essentially redefined the constitutive link between the state and its citizens – as well as the territorial boundaries of welfare.

Determining the material scope of the coordination rules has both a historical and a contemporary dimension. The recent raft of ECJ cases point in the same direction - fewer social benefits can be confined to national territory, and free movement *is* a right based in the concept of Union citizenship that applies to everyone. When this right becomes better communicated to Union citizens and become more transparent, we will be better capable of accessing the (likely) multidimensional impact on welfare states. An impact which also depends on the future way and extent of cross border mobility between 27 - or more - member states.

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